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8 UNITED STATES DISTRICT COURT

9 EASTERN DISTRICT OF CALIFORNIA

10 ROBERT T. MATSUI FEDERAL COURTHOUSE

11 CALIFORNIA SPORTFISHING  
12 PROTECTION ALLIANCE,

13 Plaintiff,

14 v.

15 KATHLEEN ALLISON, in her  
16 official capacity as Secretary  
of the California Department of  
17 Corrections and Rehabilitation,

18 Defendants.

19 COUNTY OF AMADOR, a public  
20 agency of the State of  
California,

21 Plaintiff,

22 v.

23 KATHLEEN ALLISON in her  
official capacity as Secretary  
of the California Department of  
24 Corrections and Rehabilitation;  
PATRICK COVELLO in his official  
25 capacity of Warden of  
California Department of  
26 Corrections and Rehabilitation  
Mule Creek State Prison,

27 Defendants.

Case No. 2:20-cv-02482-WBS-AC

PLAINTIFFS COUNTY OF AMADOR'S  
AND CALIFORNIA SPORTFISHING  
PROTECTION ALLIANCE'S  
SEPARATE STATEMENT OF  
UNDISPUTED FACTS IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
SUMMARY ADJUDICATION

No. 2:21-cv-0038-WBS-AC

Date: Aug. 22, 2022  
Time: 1:30 p.m.  
Court: 5

Action Filed: Jan. 7, 2021  
Trial Date: April 18, 2023

[Filed with:

1. Not. & P. & A;
2. Decls. of Ashby, Opalenik,  
Andrews, Carlon, Emerick,  
Taylor, Evatt, and  
McHenry;
4. Appendix of Exs.;
5. [Proposed] Order]

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SEPARATE STATEMENT OF UNDISPUTED FACTS

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 260(a), Plaintiffs County of Amador ("Amador") and California Sportfishing Protection Alliance ("CSPA") submit their Statement of Undisputed Facts in support of their Motion for Summary Adjudication, together with references to supporting material facts and cites to supporting evidence.

ISSUE NO. 1: Amador has standing.

UNDISPUTED MATERIAL FACTSOPPOSING PARTY'S RESPONSEAND SUPPORTING EVIDENCEAND SUPPORTING EVIDENCE

1. Amador hired an engineering firm to investigate contamination from Mule Creek State Prison ("MCSP"). Declaration of Michelle Opalenik, filed concurrently ("Opalenik Decl."), ¶ 3; Carlton Engineering Inc. report, dated Dec. 6, 2006, ex. 1.

2. Amador established the Amador Safe Drinking Water Program to connect drinking water wells within 1 mile of

1 MCSP that have nitrate levels  
2 in excess of the maximum  
3 contaminant level to the  
4 community water system.  
5 Opalenik Decl., ¶ 4; Amador  
6 Board of Supervisors' Reso.  
7 No. 07-163, adopted Aug. 7,  
8 2007, ex. 2.

9  
10 3. Amador provided a grant  
11 of an amount not to exceed  
12 \$18,830 to a property owner to  
13 fund construction of a  
14 connection to the community  
15 water system under the  
16 Program. Opalenik Decl., ¶ 5;  
17 Construction Contract, dated  
18 Sept. 6, 2007, ex. 3.

19  
20 4. Amador continues to  
21 devote staff time to monitor  
22 releases from MCSP. Opalenik  
23 Decl., ¶ 6; memorandum for  
24 Community Development Director  
25 to Board of Supervisors, dated  
26 Jan 21, 2020, ex. 4.

5. Defendants failed to describe additional BMPs that it would implement to prevent or reduce any pollutants, and failed to submit an implementation schedule for those BMPs as required by the Small M4 Permit. Declaration of Karen Ashby, filed concurrently ("Ashby Decl."), ¶ 6.M; Central Valley Regional Water Quality Control Board ("Regional Board") comment letter, dated Feb. 11, 2022, ex. 17.

ISSUE NO. 2: CSPA has standing.

UNDISPUTED MATERIAL FACTS  
AND SUPPORTING EVIDENCE

OPPOSING PARTY'S RESPONSE  
AND SUPPORTING EVIDENCE

6. CSPA's members use and enjoy the waters downstream from Mule Creek State Prison for recreational, aesthetic, and commercial purposes. Declaration of Richard

McHenry, filed concurrently ("McHenry Decl."), ¶¶ 13-14; Declaration of Edmund Taylor, filed concurrently ("Taylor Decl."), ¶¶ 2-10; Declaration of Katherine Evatt, filed concurrently ("Evatt Decl."), ¶¶ 4-15.

7. CSPA's members are concerned about the harmful effect of Defendants' polluted discharges on the waters downstream of Mule Creek State Prison. McHenry Decl., ¶¶ 16-17; Taylor Decl., ¶¶ 12-19; Evatt Decl., ¶¶ 16-19.

8. CSPA's members' use and enjoyment of the waters downstream of Mule Creek State Prison has been lessened by Defendants' polluted discharges. McHenry Decl., ¶ 15-16; Taylor Decl., ¶¶ 12-19; Evatt Decl., ¶¶ 16-19.

9. CSPA's mission is directly related to protecting the quality of California's

waters. McHenry Decl., ¶¶ 5-12.

10. Defendants failed to describe additional BMPs that it would implement to prevent or reduce any pollutants and failed to submit an implementation schedule for those BMPs as required by the Small M4 Permit. Ashby Decl., ¶ 6.M; Central Valley Regional Water Quality Control Board ("Regional Board") comment letter, dated Feb. 11, 2022, ex. 17.

ISSUE NO. 3: Mule Creek is a Water of the United States.

UNDISPUTED MATERIAL FACT  
AND SUPPORTING EVIDENCE

OPPOSING PARTY'S RESPONSE  
AND SUPPORTING EVIDENCE

11. Mule Creek is a tributary with a significant nexus to the Mokelumne River, a traditionally navigable water. Declaration of Rebecca Andrews, filed concurrently ("Andrews Decl."), ¶ 5; Draft

Environmental Impact Report  
for the Mule Creek Infill  
Complex expansion project,  
dated June 2013 ("MCIC DEIR"),  
v. 3, ex. 19, p. 811.

12. State Board and Regional  
Board consider Mule Creek a  
water of the United States.  
Ashby Decl., ¶¶ 6.C, 6.J;  
Regional Board 13383 Order,  
dated Dec. 16, 2020, find. 2,  
ex. 7, p. 81; State Board  
Small MS4 Permit, adopted Feb.  
5, 2013, find. 14, ex. 13, p.  
336.

13. Defendants have  
acknowledged that Mule Creek  
is a water of the United  
States because of its riparian  
habitat and seasonal flows.  
Andrews Decl., ¶¶ 5, 6; MCIC  
DEIR v. 3, ex. 19, p. 811; 401  
Certification cover letter,  
dated June 10, 2019, ex. 20,  
p. 814.



14. The beneficial uses of Mule Creek are described in the Basin Plan to include, among other things, municipal and domestic supply, agricultural supply, recreation, and wildlife habitat. Ashby Decl., ¶ 6.E; Regional Board Water Quality Control Plan for the Sacramento River Basin and the San Joaquin River Basin, rev'd May 2018 ("Basin Plan") tbl. 2-1, ln. 59, ex. 9, p. 137.

ISSUE NO. 4: Defendants violated the Small MS Permit Discharge Provision B.1.

UNDISPUTED MATERIAL FACT  
AND SUPPORTING EVIDENCE

OPPOSING PARTY'S RESPONSE  
AND SUPPORTING EVIDENCE

15. Provision B.1 of the Small MS4 Permit provides, "Discharges of waste from the MS4 that are prohibited by Statewide Water Quality Control Plans or applicable Regional Water Quality Control

Plans (Basin Plans) are prohibited." Ashby Decl., ¶ 6.J; Small MS4 Permit, ex. 13, p. 346.

16. Defendants have past violations of the Small MS4 Permit's *E. coli* discharge prohibition on forty-one days. Ashby Decl., ¶¶ 10, 11, tbls. 2, 3.

17. Defendants have ongoing violations of the Small MS4 Permit's *E. coli* discharge prohibition on nine days. Ashby Decl., ¶ 17, tbl. 8.

18. Defendants have past violations the Small MS4 Permit's metal discharge prohibition on twenty-five days. Ashby Decl., ¶ 14, tbl. 5.

19. Defendants have ongoing violations of the Small MS4 Permit's metal discharge prohibition on seventy-seven days. Ashby Decl., ¶ 20, tbl.

10.

20. *E. coli* and metals discharged from the Facility are waste. Ashby Decl., ¶¶ 6.J, 6.A, 6.N, 24.B, 24.D; Small MS4 Permit attach. I, ex. 13, p. 614; Stormwater Report, ex. 5, p. 64; Declaration of Robert Emerick, filed concurrently ("Emerick Decl."), ¶¶ 18-20; Plaintiffs' Lab Samples, ex.18.

ISSUE NO. 5: Defendants violated the Small MS Permit Discharge Provision B.2.

UNDISPUTED MATERIAL FACT  
AND SUPPORTING EVIDENCE

OPPOSING PARTY'S RESPONSE  
AND SUPPORTING EVIDENCE

21. Provision B.2 of the Small MS4 Permit provides, "Discharges of storm water from the MS4 to waters of the U.S. in a manner causing or threatening to cause a condition of pollution or nuisance as defined in Water Code § 13050 are prohibited."

1	Ashby Decl., ¶ 6; Small MS4	
2	Permit, ex. 13, p. 346.	
3	22. Defendants have past	
4	violations of the Small MS4	
5	Permit's <i>E. coli</i> discharge	
6	prohibition on 49 days. Ashby	
7	Decl., ¶ 10, tbl. 2.	
8	23. Defendants have ongoing	
9	violations of the Small MS4	
10	Permit's <i>E. coli</i> discharge	
11	prohibition on nine days.	
12	Ashby Decl., ¶ 17, tbl. 8.	
13	24. Defendants have past	
14	violations of the Small MS4	
15	Permit's metal discharge	
16	prohibition on twenty-five	
17	days. Ashby Decl., ¶ 14, tbl.	
18	5.	
19	25. Defendants have ongoing	
20	violations of the Small MS4	
21	Permit's metal discharge	
22	prohibition on seventy-seven	
23	days. Ashby Decl., ¶ 20, tbl.	
24	10.	
25	26. <i>E. coli</i> and metals	
26	discharged from the Facility	
27	are waste. Ashby Decl., ¶¶	
28		

6.J, 6.A, 6.N, 24.B, 24.D;  
Small MS4 Permit attach. I,  
ex. 13, p. 614; Stormwater  
Report, ex. 5, p. 64; Emerick  
Decl., ¶¶ 18-20; Plaintiffs'  
Lab Samples, ex.18.

ISSUE NO. 6: Defendants violated the Small MS Permit Discharge  
Provision B.3.

UNDISPUTED MATERIAL FACT  
AND SUPPORTING EVIDENCE

OPPOSING PARTY'S RESPONSE  
AND SUPPORTING EVIDENCE

27. Discharge Prohibition B.3  
requires that "[d]ischarges  
through the MS4 of material  
other than storm water shall  
be effectively prohibited,  
except as allowed under this  
Provision or as otherwise  
authorized by a separate NPDES  
permit." Ashby Decl., ¶ 6.J;  
Small MS4 Permit, ex. 13, p.  
346.

28. There are hundreds of  
defects in both the MS4 and  
the sanitary sewer that allow

for indirect connections between the two systems. Declaration of William Carlon, filed concurrently ("Carlon Decl."), ¶¶ 3-4; Regional Board Review of Revised Storm Water System Investigation Findings Report, Dec. 7, 2020, ex. 21, pp. 870, 872-74, 884-88; EPA Inspection Report, Jan. 28, 2021, ex. 22, p. 901.

29. Both the Regional Board and EPA have determined that wastewater is entering the MS4 as a result of the defects in the MS4 and sanitary sewer systems. Carlon Decl., ¶¶ 3-4; Regional Board Review of Revised Storm Water System Investigation Findings Report, Dec. 7, 2020, ex. 21, p. 870, 872-74, 884-88; EPA Inspection Report, Jan. 28, 2021, ex. 22, p. 901.

30. Defendants' regularly discharge irrigation water from its MS4. Regional Board

Water Code Section 13383  
Order, Dec. 22, 2020, ex. 7,  
p. 82.

31. Irrigation runoff is due  
to defects in the irrigation  
system. Carlon Decl., ¶ 5;  
Comments to the Non-Storm  
Water Discharge Elimination  
Plan, April 11, 2022, ex. 23,  
p. 941.

32. During Plaintiffs' dry-  
weather inspection in March  
2022, the MS4 had water within  
the system, and the sampling  
results of that water included  
high concentrations of  
bacteria, as well as  
pharmaceuticals. Emerick  
Decl., ¶¶ 4, 13-20; March 9,  
2022 Sampling Data, ex. 18, p.  
741 (fecal coliform was  
between 79-1600 MPN/100 mL;  
total coliform greater than  
1600 MPN/100 mL in each  
sample, and *E. coli* was  
present in all samples), and  
p. 759-767 (sampling showed

1	the presence of	
2	pharmaceuticals).	
3	33. Non-storm water has been	
4	entering and discharging from	
5	the MS4 since at least January	
6	2018 when the Regional Board	
7	inspected the Facility. Carlon	
8	Decl., ¶ 6; Regional Board	
9	Water Code Section 13267	
10	Order, Feb. 14, 2008, ex. 24,	
11	p. 949.	
12	34. Defendants have not	
13	corrected the problem, and	
14	non-storm water continues to	
15	discharge through the MS4. EPA	
16	Inspection Report, Jan. 28,	
17	2021, ex. 22, p. 901; Ashby	
18	Decl., ¶¶ 24-25.	

20 ISSUE NO. 7: Defendants violated the Small MS4 Permit Receiving  
 21 Water Limitation Provision D.  
 22

23 UNDISPUTED MATERIAL FACT  
 24 AND SUPPORTING EVIDENCE

OPPOSING PARTY'S RESPONSE  
AND SUPPORTING EVIDENCE

25  
 26 35. Provision D of the Small  
 27 MS4 Permit provides, in  
 28



relevant part, that

"Discharges shall not cause or contribute to an exceedance of water quality standards contained in a Statewide Water Quality Control Plan, the California Toxics Rule (CTR), or in the applicable Regional Water Board Basin Plan." Ashby Decl., ¶ 6.J; Small MS4 Permit, ex. 13, p. 348.

36. Defendants have past violations of Mule Creek's *E. coli* receiving water limitation on nineteen days. Ashby Decl., ¶ 12, tbl. 4.

37. Defendants have ongoing violations of Mule Creek's *E. coli* receiving water limitation on five days. Ashby Decl., ¶ 19, tbl. 9.

38. Defendants have past violations of Mule Creek's metals receiving water limitation on fourteen days. Ashby Decl., ¶ 15, tbl. 6.

39. Defendants have ongoing

violations of Mule Creek's  
metals receiving water  
limitation on twenty-nine  
days. Ashby Decl., ¶ 21, tbl.  
11.

40. Defendants failed to  
describe additional BMPs that  
will be implemented to prevent  
or reduce any pollutants; and  
failed to submit an  
implementation schedule for  
those BMPs as required by the  
Small MS4 Permit. Ashby Decl.,  
¶ 6.M; Feb. 11, 2022 letter  
from Regional Board to  
Defendant Covello, ex. 719, p.  
719.

UNDISPUTED MATERIAL FACT  
AND SUPPORTING EVIDENCE

OPPOSING PARTY'S RESPONSE  
AND SUPPORTING EVIDENCE

41. Industrial General Permit  
Provision XVIIB.1 requires  
that Industrial Materials and  
Activities are protected by a  
Storm-Resistant Shelter to  
prevent all exposure to rain,  
snow, snowmelt, and/or runoff.  
Ashby Decl., ¶ 6.K; Industrial

1	General Permit, ex. 15, p.	
2	685.	
3	42. Loading and unloading	
4	activities are taking place in	
5	an area that has no side	
6	coverings exposing materials	
7	within the loading dock is	
8	subject to wind dispersion.	
9	Ashby Decl., ¶¶ 26.B, 6.L; ¶	
10	Regional Board NEC Inspection	
11	Report, dated Feb. 11, 2021	
12	("NEC Inspection Report"),	
13	fig. 2 (aerial photograph	
14	showing loading docks), ex.	
15	16, p. 706.	
16	43. Pallets are stored	
17	outside the industrial	
18	buildings in areas exposed to	
19	rain. Ashby Decl., ¶ 26.A.	
20	44. Industrial General Permit	
21	Provisions XVII.B.1 and	
22	XVII.B.3 require that waste	
23	materials be stored in a	
24	Storm-Resistant Shelter to	
25	prevent all exposure to rain,	
26	snow, snowmelt, and/or runoff.	
27	Ashby Decl., ¶ 6.K; Industrial	
28		

1	General Permit, ex. 15, p.	
2	685.	
3		
4	45. Hazmat igloo containing	
5	food grade mineral oil for	
6	equipment lubrication is	
7	leaking. Ashby Decl., ¶ 25.B;	
8	¶ 6.L; NEC Inspection Report,	
9	fig. 3, legend note 2, ex. 15,	
10	p. 707 ("Hazmat 'igloos'	
11	containing food grade mineral	
12	oil for equipment	
13	lubrication").	
14	46. Industrial General Permit	
15	Provisions XVII.E.1 requires	
16	that if one or more drainage	
17	areas require NOI [Notice of	
18	Intent General Permit]	
19	coverage, dischargers shall	
20	register for NOI coverage for	
21	the entire facility. Ashby	
22	Decl., ¶ 6.K; Industrial	
23	General Permit, ex. 15, p.	
24	687.	
25	47. The loading docks drain	
26	to a Facility outfall. Ashby	
27	Decl., ¶ 6.L; NEC Inspection	
28		

Report, 7, fig. 3, ex. 15, p.  
707 (blue arrows point to  
drain inlets outside loading  
docks).

Dated: June 28, 2022

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By: /s/ Gene Tanaka

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Dated: June 28, 2022

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